

**Agreement for the Delegation of the Federal
Prevention of Significant Deterioration (PSD) Regulations
by the United State Environmental Protection Agency, Region 10
to the State of Washington Department of Ecology**

I. Introduction

The Washington State Department of Ecology (Ecology) and U.S. Environmental Protection Agency (EPA) desire to continue to have Ecology implement and enforce the federal PSD regulations. Accordingly, EPA and Ecology are entering into this Delegation Agreement. Through this Agreement, the EPA and Ecology establish the legal and procedural bases for Ecology to conduct new source review and to implement and enforce the federal PSD regulations.

II. Legal Authority

- A. Pursuant to 40 CFR 52.21(u), the EPA Administrator may delegate to a State full or partial responsibility for conducting new source review pursuant to the federal PSD regulations found in 40 CFR 52.21. The EPA Administrator has delegated to the Director of the Region 10 Office of Air, Waste, and Toxics, the authority to delegate the federal PSD regulations to a State or local agency. The State or local agency that receives delegation from EPA Region 10 does not have the authority under the federal Clean Air Act to further delegate the federal PSD regulations.
- B. EPA's PSD regulations are found in 40 CFR 52.21, as in effect on July 1, 2004. These regulations include amendments to 40 CFR 52.21 that were promulgated on October 27, 2003 (68 FR 61248) that were stayed by court order on December 24, 2003. For the purposes of this delegation, the "federal PSD regulations" mean those regulations in 40 CFR 52.21(a)(2), (b) – (d), (h) – (r), and (v) – (bb) that were in effect as of July 1, 2004. See the July 1, 2004 Federal Register (69 FR 40274) for the specific provisions that were stayed by the court and will not become effective until the court terminates the stay.
- C. Ecology has adopted by reference, with certain minor changes, the federal PSD regulations found in 40 CFR 52.21, as in effect on July 2, 2004. See WAC 173-400-117, -118, -171, and -700 through 750 (effective February 10, 2005), hereinafter referred to as the "State PSD regulations." By adopting by reference 40 CFR 52.21 (as in effect on July 2, 2004), Ecology has adopted amendments to 40 CFR 52.21 that were promulgated on October 27, 2003 and stayed by court order on December 24, 2003 (see 69 FR 40274). By adopting by reference 40 CFR 52.21 as in effect on July 2, 2004, Ecology has also adopted the notations to 40 CFR 52.21 which identify the provisions of 40 CFR 52.21 that have been stayed by the court and provide that the stayed provisions will become effective immediately if the court terminates the stay.
- D. WAC 173-400-720(4)(b)(iii)(C) modifies 40 CFR 52.21(r)(6) to require sources to submit information and reports related to determinations of PSD non-applicability to the Washington Title V permitting authorities rather than Ecology.
- E. EPA has determined that Chapter 43.05 of the Revised Code of Washington (RCW), often referred to as "House Bill 1010," conflicts with the delegation requirements of 40 CFR 52.21(u). Based on this determination, Ecology has determined that Chapter 43.05 RCW does not apply to permit to construct requirements of Chapter 173-400 WAC, including the State PSD regulations.

- F. The Ecology Division of the Washington Attorney General's Office has issued an opinion¹ stating that the provisions of RCW 70.94.035, "Air Technical Assistance Visits by Ecology," do not prevent enforcement actions, but only require Ecology to wait until the end of the correction period to determine whether enforcement action is appropriate. Based on that opinion letter, EPA has determined that RCW 70.94.035 does not impermissibly interfere with Washington's enforcement authority. See 59 FR 42552 (August 18, 1994) (proposed interim approval of Washington's title V program).
- G. Ecology and EPA agree that requirements in PSD permits issued under the authority of the State PSD regulations are federally enforceable requirements.

III. Scope of Delegation

- A. Pursuant to 40 CFR 52.21(u), the EPA Director of the Office of Air, Waste, and Toxics hereby delegates to the Ecology Air Program Manager responsibility for implementing and enforcing the federal PSD regulations, except for the Class I variance provisions in 40 CFR 52.21(p)(5) – (8), for sources located in the State of Washington, subject to the terms and conditions of this Delegation Agreement
- B. Pursuant to 40 CFR 52.21(u), the EPA Director of the Office of Air, Waste, and Toxics also hereby delegates to the Directors of the Washington Title V permitting authorities the responsibility for receiving, on behalf of the Administrator, the information and reports required pursuant to 40 CFR 52.21(r)(6) from sources located in the State of Washington.
- C. Ecology's delegation to conduct new source review and to implement and enforce the federal PSD regulations under this Delegation Agreement does not extend to sources or activities located in Indian Country, as defined in 18 U.S.C.1151. Consistent with previous federal program approvals or delegations, EPA will continue to implement the federal PSD regulations in Indian Country in Washington because Ecology did not adequately demonstrate its authority over sources and activities located within the exterior boundaries of Indian reservations and in other areas of Indian Country. The one exception is within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. § 1773, Congress explicitly provided State and local agencies in Washington authority over activities on non-trust land within the 1873 Survey Area. Therefore, Ecology will implement and enforce the federal PSD requirements on these non-trust lands of the 1873 Survey Area as provided in this Delegation Agreement.
- D. Ecology's delegation to conduct new source review and to implement and enforce the federal PSD regulations under this Delegation Agreement does not extend to sources or activities under the jurisdiction of the State of Washington Energy Facilities Site Evaluation Council (EFSEC).
- E. Ecology's authority to conduct new source review and to implement and enforce 40 CFR 52.21 does not include the amendments to 40 CFR 52.21 promulgated on October 27, 2003 (68 FR 61248) that are currently stayed by court order.

¹Letter from Mary Sue Wilson, Assistant Attorney General, to Chuck Clarke, Regional Administrator, dated June 7, 1994, regarding Supplement to October 27, 1993 and December 30, 1993 Attorney General Opinion Letters for Washington State Department of Ecology.

IV. Requirements

- A. Ecology shall issue PSD permits under this Delegation Agreement utilizing the State PSD regulations and 40 CFR Part 124.19 as it relates to appeals of PSD permits.
- B. The responsibility for conducting new source review for all regulated sources as provided by this Delegation Agreement, including those under the jurisdiction of the Industrial Section, the Nuclear and Mixed Waste Program, and local air authorities in the State of Washington, rests with Ecology's Air Quality Program. EPA is relying on the technical and programmatic expertise of program staff located in the Ecology Air Quality Program Headquarters Office (AQP-Headquarters) for the implementation of this Delegation Agreement.
 - 1. The processing and issuance of PSD permits, Clean Unit Designations, Pollution Control Project Approvals, and Plant-wide Applicability Limits shall be conducted by program staff located in Ecology's AQP-Headquarters.
 - 2. Enforcement of PSD permits, Clean Unit Designations, Pollution Control Project Approvals, and Plant-wide Applicability Limits shall be conducted as described in Section VI of this agreement.
 - 3. AQP-Headquarters will make all determinations related to the applicability and interpretation of the federal PSD regulations as they would apply to individual stationary sources and applications. AQP-Headquarters determinations will be made by an AQP-Headquarters section manager or higher level Ecology manager. A copy of any written determination will be sent to EPA Region 10.
- C. Ecology will ensure that there are adequate resources and trained personnel in the AQP-Headquarters to implement an effective PSD permit program. As requested, EPA will provide technical assistance related to the federal PSD requirements, including without limitation, PSD applicability determinations, best available control technology (BACT) determinations, air quality monitoring network design, and modeling procedures. EPA will provide PSD training for Ecology staff to meet needs identified by EPA or Ecology.
- D. Where the rules or policies of Ecology are more stringent than the federal PSD regulations, Ecology may elect to include such requirements in the PSD permit along with the EPA requirements.
- E. If both a state or local regulation and a federal regulation apply to the same source, both must be complied with, regardless of whether one is more stringent than the other, subject to the requirements of section 116 of the Clean Air Act.
- F. Ecology will follow all PSD policy, guidance, and determinations issued by EPA for implementing the federal PSD regulations as provided in this Delegation Agreement. EPA will provide Ecology with copies of EPA policies, guidance, and determinations through the Region 7 NSR database and/or hard copies where appropriate. Where no current EPA policy or guidance clearly covers a specific situation or where the guidance in the Region 7 NSR database is in conflict with current PSD program requirements, Ecology shall consult with the EPA Office of Air, Waste, and Toxics on its proposed interpretation of the EPA regulations.
- G. Ecology will at no time grant a waiver to the requirements of the federal PSD regulations or to the requirements of an issued PSD permit.

- H. Ecology shall consult with the appropriate State and local agency primarily responsible for managing land use as provided in 40 CFR 52.21(u)(2)(i) prior to making any determination under this Delegation Agreement.

V. Permit Issuance, Modification, and Appeals

- A. Ecology shall not issue a PSD permit until EPA has notified Ecology in writing that EPA has satisfied its obligations, if any, under Section 7 of the Endangered Species Act (ESA), 16 USC § 1531 et seq., and 50 CFR Part 402, Subpart B ("Consultation Procedures"), and with Section 305(b)(2) of the Magnuson-Stevens Fishery and Conservation Act ("Magnuson-Stevens Act"), 16 USC § 1801 et seq., and 50 CFR Part 600, Subpart K ("EFH Coordination, Consultation, and Recommendations"), for federal PSD permits, regarding essential fish habitat. The Attachment to this Delegation Agreement contains a description of EPA's steps and timelines for ESA consultation.
- B. All final determinations issued by Ecology under this Delegation Agreement shall indicate that an appeal to the EPA Administrator (Environmental Appeals Board) is available pursuant to 40 CFR Part 124.
- C. The permit provisions in 40 CFR 124.19 shall apply to all appeals to the EPA Administrator on PSD permits issued by Ecology under this Delegation Agreement. For purposes of implementing the Federal permit appeal provisions under this delegation, if there is a public comment requesting a change in a preliminary determination or proposed permit condition, the final permit issued by Ecology is required to state that in accordance with 40 CFR 124.15 and 124.19:
 - 1. The effective date of the permit is 30 days after service of notice to the applicant and commenter of the final decision to issue, modify, or revoke and reissue the permit, unless review is requested on the permit under 40 CFR 124.19 within the 30 day period.
 - 2. If an appeal is made to the EPA Administrator, the effective date of the permit is suspended until such time as the appeal is resolved.
- D. Revisions to existing PSD permits, including administrative amendments, shall be processed in accordance with requirements of WAC 173-400-750 and WAC 173-400-730(5).
- E. Failure by Ecology to comply with the requirements of WAC 173-400-730 through 750 and Sections IV. and V. of this Delegation Agreement shall render the subject permit invalid for federal PSD purposes.

VI. Enforcement

- A. Ecology or the local air authority with jurisdiction over the source will have the primary responsibility for enforcing the federal PSD regulations for sources subject to this Delegation Agreement, provided, however, that:
 - 1. In the case of any requirement of the federal PSD regulations that is not also a requirement of the State PSD regulations, EPA retains primary enforcement authority.
 - 2. Ecology shall have the responsibility under this Delegation Agreement to enforce the federal PSD regulations in the event that a local air authority does not.

3. In all cases, EPA retains authority pursuant to sections 113 and 167 of the Clean Air Act with respect to sources that are subject to the federal PSD regulations.
- B. In delegated programs, the role of the State and local agencies is that of primary enforcer or “front line” agency in program implementation. This includes helping to define EPA’s role in the regulated community for a given program. EPA’s principal role is “back up” for the State/local program. However, EPA will initiate an enforcement action, as appropriate, under the following circumstances:
1. At the State or local air agency’s request;
 2. If a State or local air agency action is determined to be inadequate, or the State/local agency fails to carry out action in a timely or appropriate manner (in this situation, the parties will adhere to the “no surprises” principle and will follow the conflict resolution process described in Section IX of the *Washington State Compliance Assurance Agreement for Air Programs (May 30, 2003)*); and/or
 3. As part of EPA’s role established in the collaborative planning process, which includes those situations where national, regional, or sector initiatives warrant an EPA lead.
- C. PSD enforcement actions under this Delegation Agreement will be undertaken by qualified inspectors or trained enforcement staff in Ecology’s AQP Regional Offices, Ecology’s Industrial Section, Ecology’s AQP Headquarters, Ecology’s Nuclear and Mixed Waste Program, or local air authorities.
- D. Enforcement of the federal PSD regulations is subject to the *Washington State Compliance Assurance Agreement for Air Programs (May 30, 2003)*, signed by both the State and local agencies. This clearly defines roles and responsibilities, including timely and appropriate enforcement response and the maintenance of the Aerometric Information Retrieval System/Aerometric Facility Subsystem (AIRS/AFS).

VII. EPA and Ecology Communications

- A. Ecology shall submit to EPA a copy of each PSD permit application and a copy of every action related to the consideration of the PSD permit.
- B. Ecology shall provide an opportunity for the EPA permit engineer to meet with the Ecology permit writer at not less than two points in the permitting process: (1) prior to Ecology making the completeness determination on a permit application, and (2) prior to Ecology making its preliminary determination and proposed permit available for public comment. The purpose of these meetings is to identify and resolve any issues between the agencies prior to Ecology making these determinations. EPA will remain cognizant of Ecology’s permit processing timelines and will work rapidly to resolve any issues to prevent or minimize any delays.
- C. Ecology and EPA should communicate sufficiently to guarantee that each is fully informed and current regarding interpretation of federal PSD regulations (including any unique questions about PSD applicability). Any records or reports relating to PSD permitting or compliance with PSD requirements that are provided to or otherwise obtained by Ecology and are not provided to EPA in accordance with VII.A. above shall be made available to EPA upon request.

- D. Ecology will enter information on each final BACT determination for a PSD permit into EPA's RACT/BACT/LAER Clearinghouse within 30 days after final permit issuance.
- E. Ecology will ensure that all relevant source information, notifications and reports are entered into the EPA AIRS/AFS national database system in order to meet its record keeping and reporting requirements. In addition to the National Minimal Data Requirements (MDRs) (attached), Ecology shall enter the following information or activities:
 - 1. The Air Program Code for PSD
 - 2. The date the PSD permit is issued or modified
 - 3. The final effective date of the PSD permit (or modified permit)
 - 4. The date that the new source or modification begins construction; and
 - 5. The date that the new source or modification begins operation.

- F. Correspondence from EPA to Ecology will be sent to:

Manager, Technical Services Section
Department of Ecology, Air Quality Program
P. O. Box 47600
Olympia, WA 98504-7600

Correspondence from Ecology to EPA will be sent to:

Manager, Federal and Delegated Air Programs Unit
Office of Air, Waste, and Toxics, AWT-107
Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

VIII. Future Changes to EPA or Ecology Regulations

- A. Ecology's delegation to conduct new source review and to implement and enforce the federal PSD regulations does not extend to changes to 40 CFR 52.21 that occur after July 1, 2004.
- B. A new request for delegation will be required for any changes to 40 CFR Part 52.21 occurring after July 1, 2004. This includes the amendments to 40 CFR 52.21 that were promulgated on October 27, 2003 (68 FR 61248) that are currently stayed by court order as described in 69 FR 40274. Implementation and enforcement of new or revised federal PSD regulations will remain the sole responsibility of EPA until a new Delegation Agreement is signed.
- C. In the event that Ecology's rules change, this delegation shall be either amended to ensure the continued implementation of EPA's PSD regulations or the delegation shall be revoked. Ecology shall keep EPA apprised of any proposed modifications to its basic statutory or regulatory authorities, or procedures.

IX. Administrative

- A. This delegation supersedes the previously delegated authority contained in the March 28, 2003 Agreement for Delegation.

- B. If, after consultation with Ecology, EPA makes any of the following determinations, this delegation may be revoked in whole or in part. As part of the consultation, the parties will adhere to the "no surprises" principle and will follow the conflict resolution process described in Section X. Any such revocation shall be effective as of the date specified in a *Notice of Revocation*.
1. Ecology's legal authority, rules and regulations, and/or procedures for implementing or enforcing the federal PSD requirements as provided in this Delegation Agreement are inadequate;
 2. Ecology is not adequately implementing or enforcing the federal PSD regulations; or
 3. Ecology has not implemented the requirements or guidance with respect to a specific permit in accordance with the terms and conditions of this delegation, the requirements of 40 CFR 52.21, 40 CFR 124, or the Clean Air Act.
- C. In the event that Ecology is unwilling or unable to implement or enforce the federal PSD regulations as provided in this Delegation Agreement with respect to a source or activity subject to the federal PSD regulations, Ecology will immediately notify the Director of the Office of Air, Waste, and Toxics. Failure to notify the Director of the Office of Air, Waste, and Toxics does not preclude EPA from exercising its enforcement authority.
- D. EPA may review the state PSD permitting program as part of the review of the Performance Partnership Agreement (PPA) or any other appropriate agreement. EPA may review State procedures and recommend changes as necessary. All recommendations will be in writing.
- F. The Delegation Agreement shall expire on the effective date of an EPA action to approve or disapprove an Ecology PSD state implementation plan.
- G. Upon issuance by EPA Region 10 of a delegation agreement assigning full or partial implementation for the federal PSD regulations to a local air pollution control authority in Washington, this agreement is automatically modified to conform with that delegation to the local authority.
- X. Dispute Resolution**

EPA and Ecology will use an agreed upon dispute resolution process to handle the conflicts that may arise as the agencies implement the PSD permitting program and will treat the resolution process as an opportunity to improve the agencies' joint efforts and not as an indication of failure.

A. Informal Dispute Resolution Guiding Principles

EPA and Ecology will ensure that all staff and managers:

1. Recognize conflict as a normal part of the State/Federal relationship.
2. Approach disagreement as a mutual problem requiring efforts from both agencies to resolve disputes.
3. Approach the discussion as an opportunity to improve the product through joint efforts.
4. Aim for resolution at the staff level, while keeping management briefed.
5. Seriously consider all issues raised but address them in a prioritized format to assure that sufficient time is allocated to the most significant issues.

6. Promptly disclose underlying assumptions, frames of reference and other driving forces.
7. Clearly differentiate positions and check understanding of content and process with all appropriate or affected parties to assure acceptance by all stakeholders.
8. Document discussions to minimize future misunderstandings.
9. Pay attention to time frames and/or deadlines and escalate quickly when necessary.

B. Formal Conflict Resolution

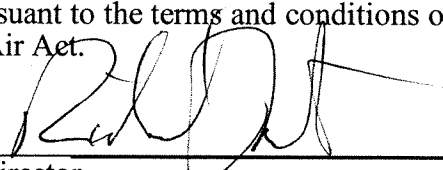
The following conflict resolution procedures will be used if the informal route has failed to resolve all issues:

1. Define dispute - any disagreement over an issue that prevents a matter from going forward.
2. Resolution process - a process whereby the parties move from disagreement to agreement over an issue.
3. Principle - all disputes should be resolved at the front line or staff level.
4. Time frame - generally, disputes should be resolved as quickly as possible but within two weeks of their arising at the staff level. If unresolved at the end of two weeks, the issue should be raised to the next level of each organization.
5. Escalation - when there is no resolution and the two weeks have passed, there should be comparable escalation in each organization, accompanied by a statement of the issue and a one-page issue paper. A conference call between the parties should be held as soon as possible. Disputes that need to be raised to a higher level should again be raised in comparable fashion within each organization.

XI. Signatures

On behalf of the Environmental Protection Agency, I grant delegation of the federal PSD regulations to the Washington Department of Ecology pursuant to the terms and conditions of this delegation agreement and the requirements of the Clean Air Act.

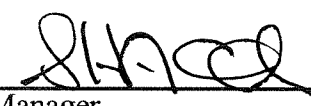
Date: 2/23/05



Director
Office of Air, Waste, and Toxics
Environmental Protection Agency
Region 10

On behalf of the State of Washington and the Department of Ecology, I accept delegation of the federal PSD regulations pursuant to the terms and conditions of this delegation agreement and the requirements of the Clean Air Act.

Date: 2/24/05



Manager
Air Quality Program
State of Washington
Department of Ecology

Attachment 1

Region 10 Process for Fulfilling Obligations under the Endangered Species Act (ESA) and the Magnuson-Stevens Act (MSA) (specifically Essential Fish Habitat) for PSD Permits

Determine if a biological assessment (BA) is needed

- After receipt of a permit application Region 10 will determine what, if any, threatened/endangered species (T/ES) are located in the proximity of the proposed action. A species list will be requested from the Services if the lists are not available on the Services websites.
- If there are no endangered or threatened species in the proximity of the proposed action, Region 10 will make a note to the file/administrative record of a finding of no effect and provide a copy to Ecology. ESA/MSA obligations are satisfied.
- If T/ES are present, either Region 10 or the permit applicant must prepare an initial review using screening criteria. If the conclusion from the initial review is "no effect," then Region 10 will draft a memo to the file/administrative record of the review its finding of no effect, and provide a copy to Ecology. ESA/MSA obligations are satisfied.
- Region 10's goal will be to complete these steps prior to Ecology's completeness determination on the permit application, contingent on available resources.

Preparing the BA

- If the initial review is inconclusive, or suggests that the proposed action "may affect, but not likely to adversely affect" T/ES, then a biological assessment (BA) will need to be prepared.
- The BA should be prepared as soon as possible and can be done either by the applicant (using a consultant) or by Region 10.
- The Region 10 Office of Environmental Assessment (OEA) would be the office that would prepare the BA. The ability of OEA to prepare BA's is limited and will be prioritized based on workload. OEA would, in most cases, also review the BA prepared by the applicant.
- The BA must address the topics required by the Services, as described in the "**Consultation Handbook (1998).**"
- Region 10 will attempt to ensure that the BA is prepared and shared with the Services in a timely manner. However, this is dependent upon the resources EPA has available.

After the BA has been prepared

- Once the BA has been prepared, and a conclusion of "may affect, but not likely to adversely affect" has been reached, Region 10 will make a finding based on the information presented in the BA.
- Region 10 will determine whether or not it agrees with conclusion in the BA. If it does, then the BA will be transmitted to the appropriate Services offices asking for concurrence with the findings of "may affect, not likely to adversely affect." (See "Contact List for FWS and NOAA Fisheries Offices.")
- Once concurrence is obtained from the Services, Region 10 will prepare memo to file/administrative record summarizing the date concurrence was obtained and the species evaluated, noting that informal consultation has been completed. Region 10 will provide a copy of this to Ecology. ESA/MSA obligations are satisfied.
- If the BA concludes that the action is likely to adversely affect or jeopardize the species, or if the Services do not concur, and changes cannot be made to the BA or project (including mitigation) to satisfy their concerns, then formal consultation will need to take place.

Other Considerations

The administrative record, and as appropriate, the preliminary determination, final determination, and permit should reflect the actions taken as a result of complying with the ESA/MSA.